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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDGAR I. PEREZ, Defendant and Appellant.	B165450 (Los Angeles County Super. Ct. No. NA052658)

Appeal from a judgment of the Superior Court of Los Angeles County. Arthur Jean, Jr., Judge. Reversed with directions and affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Ellen Birnbaum Kehr, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I through VI, the last paragraph of part VII, and parts VIII through X.

Edgar I. Perez appeals from the judgment entered upon his conviction by jury of attempted murder, in the commission of which he personally and intentionally used and discharged a firearm, causing great bodily injury (Pen. Code, §§ 664/187, subd. (a), 12022.53, subds. (b), (c), (d)), and two counts of making criminal threats, in the commission of which he personally used a firearm (Pen. Code, §§ 422, 12022.5, subd. (a)(1)). The jury found that the attempted murder was committed for the benefit of a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)(1).[1] Appellant was sentenced to prison for nine years for attempted murder, with a firearm enhancement of 25 years to life, and to a consecutive term of eight months, with a firearm use enhancement of one year four months, on each of the criminal threat counts. In addition, he was sentenced to a term of life for the criminal street gang enhancement.

Appellant contends that (1) the trial court failed to instruct the jury on the lesser included offense of attempted criminal threat; (2) the evidence was insufficient to support the conviction of making a criminal threat against Sagun Chhin; (3) the trial court failed to instruct the jury on the elements of the crime that was threatened; (4) section 422 is unconstitutionally vague; (5) the prosecution of appellant's statement as a criminal threat violated his right to freedom of speech; (6) the evidence was insufficient to support the finding of firearm use on the criminal threat counts; (7) the admission of a hearsay statement under the spontaneous declaration exception was erroneous and violated his right of confrontation; (8) the evidence was insufficient to support the gang enhancement; (9) it was error to fail to identify and state the elements of the predicate offenses required to establish a pattern of criminal activity for the criminal street gang enhancement; (10) the trial court erred in failing to instruct the jury on the evaluation of hypothetical questions pursuant to CALJIC No. 2.82;

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[1] Unless otherwise specified, all further statutory references are to the Penal Code.

(11) trial counsel provided ineffective assistance in failing to object to the admission of irrelevant evidence; (12) the trial court failed to state a valid reason for imposing consecutive sentences; and (13) the trial court erred in imposing a life sentence on the criminal street gang enhancement.

We reverse the finding on the criminal street gang allegation because the evidence failed to establish a requisite element of that allegation. In addition, we reverse the conviction of making a criminal threat against Sagun Chhin because of instructional error. We otherwise affirm.

FACTS

Viewed in accordance with the usual rules on appeal (*People v. Snow* (2003) 30 Cal.4th 43, 66), the evidence established that at approximately 3:00 on the afternoon of February 21, 2002, Siuva C., a teenage Asian male, was walking with Melinda L., his girlfriend's 11-year-old sister, on 17th Street near Rose Avenue in Long Beach. Appellant and another Latino youth approached them on bicycles, and appellant pushed Siuva's shoulder and told him to move. Siuva did so, observing an object that looked like a gun in appellant's hand. After appellant and his companion reached the end of the block, appellant rode back and asked Siuva where he was from. Siuva, who was not a gang member, said, "Nowhere." Appellant held the gun on the steering wheel of his bicycle at a distance of three or four feet from Siuva. He stated, "Fuck Nips,"[2] and fired two shots, striking Siuva in the chest and upper stomach. He then rode off toward Rose Avenue.

Siuva was taken to a hospital, where his spleen and part of his large intestine were removed and he had surgery on his kidneys. As a result of the shootings, his ability to walk and run was limited because his lungs could collapse at any time. Officers recovered two shell casings from the scene of the shooting.

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[2] "Nips" is a derogatory word for Asians.

Zenaida Cabiera heard the gunshots outside her house on the corner of Rose and 17th and saw an individual riding a bicycle on Rose toward 15th Street. As he rode away, he laughed and said, "Pop, pop."

Savy S., a teenage Asian male, was in the front yard of his Rose Avenue house shortly after 3:00 that afternoon with his mother, Sagun Chhin, and his infant brother. He and his mother heard the gunshots coming from the corner of Rose and 17th. A few minutes later, Savy saw appellant and a companion riding chrome BMX bicycles on Rose toward 15th Street. As appellant rode by Savy and Chhin, he waved a gun in the air and said, "Fuck Nips. We gonna kill all Nips." As appellant said this, he was looking at Savy, his mother and his brother. Although appellant did not stop when he made the threat and did not point the gun directly at Savy, Savy was frightened. He believed that appellant was going to carry through with his threat.

Chhin, Savy's mother, testified that she became nervous and fearful after hearing the gunshots, and when she "saw a lot of people making commotions," she sat down and ducked, hugging her infant because she was afraid the baby would be shot. She testified that she did not see anything and did not hear anyone say anything to her family, and she denied telling her daughter, Chanky Ork, that someone came up on a bicycle and threatened to kill her family. Ork testified that Chhin called her at work shortly thereafter and told her that a boy on a bicycle had shot an Asian boy next to their house. Chhin stated that she believed the boy had died. Chhin had her head down and did not look at the boy on the bicycle. Ork further testified, "She [Chhin] said she was standing right in front of the house with her head down, and he just threatened. She doesn't know if it's a threat to her or to whom, but all she heard he said was he will kill all Asians, and she had her head down ready to duck cause she was afraid he might shoot too." Chhin told Ork that she was afraid to be in court.

One of the police officers who arrived at the scene brought Melinda L. to view three individuals who had been detained. Appellant was not one of the three. Melinda did not identify any of the three as the shooter.

Siuva described the shooter to police and, five days after the shooting, he identified appellant's's photograph from a photographic lineup. Siuva indicated that he was 75 to 80 percent positive and that he was not 100 percent positive because, in the photograph, appellant's hair was "a little longer." Savy identified appellant's photograph from the photographic lineup, writing, "Number 12 is the guy that had the gun in his right hand and said that stuff to me and my mom." He testified at trial that he had been 75 percent sure. Zinaida Cabiera also identified appellant from the photographic lineup, writing, "Number 12 looks like the guy. I can't be positive because I only saw him from the side as he passed by." She stated that she had not chosen any of the other photographs because "they looked different."

At trial, Siuva testified that he saw appellant's face for 10 to 20 seconds while appellant was riding back towards him, and he testified that he was positive appellant was his assailant. Savy testified that he saw appellant's face for five seconds, and he identified him at trial. Cabiera stated that the person she had seen at the time of the shooting was not in the courtroom but acknowledged that she did not look around the courtroom to see if he was present.[3] Melinda L. identified appellant at trial.

A few weeks later, on March 13, 2002, appellant was arrested at his family's residence, about a mile or mile and a half from the location of the shooting of Siuva C. Police officers searching appellant's home found two .38-caliber bullets, six .32-caliber bullets, and one .22-caliber bullet, as well as 30/30 caliber shotgun ammunition, in a fanny-pack in his mother's bedroom. A .40-caliber bullet was found in appellant's bedroom on a shelf next to his bed. In his bedroom were also found a baseball cap with the letters "CLB," which stood for Crazy Latin Boys, a Long Beach gang, as well as photographs and negatives showing appellant with other Hispanic males making gang signs with their hands, together with papers with the letters CLB

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[3] During this exchange, the prosecutor asked Cabiera why she was looking at the jury box and at the judge. In his argument, the prosecutor pointed out that Cabiera would not look at appellant when she was asked if the person she had seen was in the courtroom.

and gang names on them. The officers also found a paper with the word "Nips" with an X over it, a newspaper article about the death of Martin Mendoza, stating that he had died in an apparent gang shooting, a piece of paper stating "in loving memory of Mark *[sic]* Mendoza" and a program from Mendoza's funeral. The barrel of a shotgun and an old bolt action rifle were found in the garage. In a search of another location, a photo album was found which included photographs of a number of people, including appellant, around a casket containing Mendoza's body.

Mendoza had been shot to death on February 15, 2002, during a gun battle in Long Beach with members of an Asian gang. The next day, three Asian gang members were shot near the area of East 20th Street, Long Beach. Two days later, on February 18th, an Asian teenager was shot near East 15th Street, Long Beach. The police did not know if the latter victim was a gang member, although there was Asian gang graffiti in the area. A police officer testified that when the youth was asked who shot him, he stated, "CLB." Long Beach Latino and Asian gangs had been enemies for 10 or 15 years.

Officers recovered four nine-millimeter shell casings from the scene of the February 16th shooting and four nine-millimeter casings from the scene of the February 18th shooting. A Long Beach Police Department criminalist determined that the casings recovered from the scenes of those crimes, as well as the casings recovered from the scene of the shooting of Siuva C., all had been fired from the same gun.

Detective Abel Morales, a gang expert, characterized the relationship between Asian and Hispanic gangs in Long Beach in 2002 to be one of hatred, which manifested itself in shootings and murders. The CLB gang considered itself a rival of all Asians and Blacks. Appellant acknowledged to a Long Beach police officer in February 2001 that he was affiliated with CLB. On March 6, 2002, shortly before his arrest, he told an officer that he belonged to East Side Longo, a gang that was affiliated with CLB, and on March 12, 2002, the day before his arrest, he told another officer that he was from the CLB gang. He stated that his moniker or nickname was Evil or Little Evil. Detective Morales testified that the gang writings in appellant's room

showed that he was a hardcore CLB gang member. One writing found in appellant's room referring to Hispanic gang members had the letters N and A crossed out, an indication of disrespect symbolizing the intent to shoot or kill Blacks and Asians.

Detective Morales testified that the CLB gang began about six years earlier with 10 members, and at the time of trial it had approximately 20 members. It was allied with the East Side Longos, a gang with over 300 members. Detective Morales had investigated crimes committed by the CLB gang, including the attempted murder of a young Asian boy approximately six years earlier. In that crime, the gang members asked the boy, who did not speak English, where he was from and then beat him until he was comatose.

When a gang member asks "Where are you from," he is planning to engage in violence. A gang member gains respect within the gang by committing crimes, and shooting a member of a rival race "would be instant respect." Gang members do not commonly keep their guns at their own houses. Guns are passed around from one member to another, particularly to individuals who are not on parole or probation and thereby subject to searches, so the gang members may avoid being linked to a particular shooting. In the detective's opinion, the different types of ammunition found in appellant's house meant that appellant was able to obtain guns to match these types of ammunition.

Gang members commonly keep newspaper articles about deceased fellow gang members, and the presence of the article about Mendoza's death in appellant's room indicated that he had been close with Mendoza. Gang members believe they are required to avenge the death of a fellow gang member. Detective Morales therefore found it significant that there had been a shooting of three Asian youths the day after Mendoza's death, followed by the shootings of other Asian youths, some of whom were gang members and some of whom were not, in the days that followed. The shooting of Siuva was in retaliation for actions taken by the Asian gang members.

The prosecutor posed a hypothetical to Detective Morales including the following: that appellant admitted membership in CLB and that his moniker was Evil

or Little Evil, that the killing of Mendoza was immediately followed by the shootings of the Asian gang members and other Asian youths, that appellant asked Siuva where he was from and said, "Fuck Nips" before shooting him, that the shooting of Siuva was done in the daytime and appellant was accompanied by another person at the time, that appellant stated something like "Fuck all Asians, I'll kill you too" as he waved a gun at an Asian family, and that gang photos and materials were found in appellant's house. Given these circumstances, Detective Morales was of the opinion that the shooting of Siuva was for the benefit of appellant's gang.

In defense, appellant's mother testified that appellant stayed home from school on February 21, 2002, and left the house on a bicycle shortly after noon. He returned at approximately 3:30 or 4:00 p.m. The clothing he was wearing that day did not resemble that described as having been worn by Siuva's assailant. She did not remember where appellant was on earlier dates in February except that he did not go to school on February 18 and had been in and out of the house with friends. She had been concerned about his "hanging out" with gang members, although she denied knowledge of CLB. She claimed that the garage where the shotgun barrel and rifle had been found was rented to someone other than a family member and that none of her family's property was in the garage.

Appellant's younger sister testified that on February 21, 2002, she saw appellant on Fifth Street and Walnut, near their house, as she was walking home from school with Jose Medina, her mother's boyfriend, some time before 2:45 p.m. Appellant was not on a bicycle. Appellant returned home at 3:30 or 4:00 p.m. His sister acknowledged that appellant sometimes rode a friend's chrome-colored BMX bicycle that was kept at appellant's house. Medina, who stated that he was a good friend of appellant's, also testified that he saw appellant walking on Fifth Street between 2:30 and 2:40 p.m. that day, and he stated that appellant had not returned home by the time Medina left for work at 3:30 p.m. Medina denied that he was a member of the CLB gang and denied knowing whether appellant was a member of the gang.

DISCUSSION

[This Part Is Not Certified for Publication]

I. The evidence was sufficient to support the conviction of making a criminal threat against Chhin.

Appellant contends that the evidence failed to support his conviction of making a criminal threat against Chhin in violation of section 422. This contention is without merit.

"In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat . . . was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Appellant argues that the evidence does not establish "the element of reasonable, sustained fear" as to the count involving Chhin, because at trial Chhin denied hearing any threats or telling her daughter that she heard someone threaten her family, and because Chhin's daughter testified that Chhin said she did not know if the threat was directed towards her. Appellant claims that although Chhin told her daughter she put her head down because she was afraid that appellant might shoot, this was transitory fear resulting not from the threat but from the fact that Chhin had just heard gunshots.

"Sustained fear" has been defined as "a period of time that extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th

1149, 1156.) Momentary fear does not suffice to establish this element. (*In re Ricky T*. (2001) 87 Cal.App.4th 1132, 1140.) In *Allen*, the court pointed out that "[t]he victim's knowledge of defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear." (*Allen*, *supra*, at p. 1156.)

"The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) Under this standard, sufficient evidence supports the conviction.

At trial, Chhin denied hearing any threats. She testified that she became nervous and fearful after hearing the gunshots near her house, and because she "saw a lot of people making commotions," she ducked and was afraid the infant she was holding would be shot. However, she then called her daughter and told her that a person on a bicycle shot an Asian boy near their house, that she believed the boy had died, and that as she was standing in front of her house, the person threatened to kill all Asians and that "she had her head down ready to duck cause she was afraid he might shoot too." A rational trier of fact could conclude, as the prosecutor argued, that Chhin was lying in her trial testimony because she was afraid, and that she did in fact hear appellant's threat to kill all Asians and was thereby placed in fear. Given the shooting of an Asian boy immediately preceding the threat, which Chhin believed resulted in the boy's death, and the threat to kill all Asians, causing Chhin to duck and to hug her child because she feared that they would be shot, together with the fact that she thereafter called her daughter to report the incident including the threat, substantial evidence supports the jury's determination that Chhin felt threatened and was in a state of sustained fear.

II. The trial court erred in failing to instruct the jury on the lesser included offense of attempted criminal threat.

In *People v. Toledo*, *supra*, 26 Cal.4th at page 230, the Supreme Court concluded that "there is a crime of attempted criminal threat." The court explained that such a crime might be committed, for example, "if a defendant, with the requisite intent, orally makes a sufficient threat directly to the threatened person, but for some reason the threatened person does not understand the threat." (*Id.* at p. 231.) Appellant contends that because a rational trier of fact could have concluded that Chhin was not placed in sustained fear as a result of the threat, the trial court erred in failing to instruct on the lesser included offense of attempted criminal threat as to Chhin. We agree.

A trial court has an obligation to instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense are present and there is substantial evidence to justify a conviction of the lesser offense. "In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162.)

Chhin's daughter testified that Chhin told her that the person on the bicycle threatened to kill all Asians and that she had her head down ready to duck, although she did not know if the threat was directed at her, because she was afraid he would shoot. However, at trial Chhin denied hearing any threats or telling her daughter that she heard any threats. She testified that she sat down and ducked and hugged her child after hearing gunshots and seeing people making a commotion. While, under the applicable standard of review, ample evidence supports the jury's determination that appellant was guilty of the charged offense, a rational jury could equally well have concluded that Chhin was in fear because she heard gunshots and not because she heard the threat. Based on this evidence, the trial court should have instructed the jury on the offense of attempted criminal threat.

On this record, we cannot conclude that the omission of this instruction was harmless error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The judgment must be reversed as to count 3. In reversing on this count, we will give the People the option of retrying appellant on the criminal threat charge in count 3 or of accepting a modification of the criminal threat conviction to attempted criminal threat. (*People v. Edwards* (1985) 39 Cal.3d 107, 118; see *People v. Kelly* (1992) 1 Cal.4th 495, 528.)

III. The trial court's failure to identify the crime allegedly threatened and to instruct on the elements of that crime does not require reversal.

Section 422 prohibits "willfully threaten[ing] to commit a crime, which will result in death or great bodily injury to another person . . . ." Appellant contends that the trial court erred in failing to identify the crime which was allegedly the subject of the threats and to instruct on the elements of that crime.

Appellant acknowledges that in *People v. Butler* (2000) 85 Cal.App.4th 745, 755-760, the court held that a trial court is not required to identify a specific crime or instruct on its elements in a prosecution under section 422. However, he argues that *Butler* was erroneously decided. We need not reach this issue, because any error in this regard would be utterly nonprejudicial.[4] (*People v. Lara*, *supra*, 30 Cal.App.4th at p. 676.)

The statement appellant made to Savy and Chhin was "Fuck Nips. We gonna kill all Nips." It was perfectly clear what the threatened crime was. As the prosecutor indicated during his opening argument, "Well, he said, [']I'll kill all Asians,[']essentially, [']Fuck you,[']after shooting an Asian. So just the fact that you threaten

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[4] We reject appellant's assertion that, in accordance with *People v. Cummings* (1993) 4 Cal.4th 1233, 1312-1315, the claimed error would be reversible per se. In *Cummings*, the trial court omitted instructions on four of the five elements of robbery. Here, any error would involve only one aspect of one element of the charged offense (see *People v. Toledo*, *supra*, 26 Cal.4th at pp. 227-228) and did not render the trial fundamentally unfair. Hence, it would be subject to review under the *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18, 24). (*People v. Flood* (1998) 18 Cal.4th 470, 502-503; *People v. Lara* (1994) 30 Cal.App.4th 658, 669.)

to kill all Asians, that's the crime that we are talking about." The jury was not required to find that appellant intended to carry out the threat, only that he had the specific intent that the statement be taken as a threat. (*People v. Toledo*, *supra*, 26 Cal.4th at p. 228; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1220.) There is no reasonable possibility of a different outcome in this trial had the trial court given an instruction identifying and giving the elements of the crime that was threatened. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

IV. Section 422 is not unconstitutionally vague.

As indicated, section 422 proscribes "willfully threaten[ing] to commit a crime which will result in death or great bodily injury to another person . . . ." Appellant contends that the language "which will result in death or great bodily injury to another person" is unconstitutionally vague because it fails to give adequate notice of what would constitute a violation of the statute and because it gives unfettered discretion to law enforcement to determine what types of statements amount to threats of criminal acts "which will result in death or great bodily injury." He argues that an inconsistent and arbitrary application of the statute might result in a chilling atmosphere in which the public is inhibited from engaging in protected speech for fear of violating the law.

We reject appellant's contention because the crime he threatened, to kill all Asians, constitutes an act that is specifically set forth in the statute. "'The rule is well established . . . that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations.' [Citation.] If the statute clearly applies to a criminal defendant's conduct, the defendant may not challenge it on grounds of vagueness. [Citations.]" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1095.)

In any event, in *People v. Maciel* (2003) 113 Cal.App.4th 679 (*Maciel*), Division Five of this court rejected the contention that section 422 is unconstitutionally vague on its face. The court determined that section 422, including the language

challenged by appellant, satisfies the due process requirements set forth in *People v. Heitzman* (1994) 9 Cal.4th 189, 199, that the statute be "definite enough to provide a standard of conduct for those whose activities are proscribed" and that the statute "provide definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement." (*Maciel*, *supra*, at pp. 683-686.)

The *Maciel* court stated, "We construe the challenged language in context, taking into account the other elements that must be established in order for the statute to be triggered. Penal Code section 422 does not criminalize all threats of crimes that will result in death or great bodily injury, leaving to law enforcement to determine those threats that will result in arrest. Instead, the statute criminalizes only those threats that are 'so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety.' This language means that not all threats of crimes that will result in great bodily injury are criminalized, but only serious threats, intentionally made, of crimes likely to result in immediate great bodily injury. Moreover, the statute also includes a specific intent element: 'with the specific intent that the statement . . . is to be taken as a threat.' A statute that criminalizes threats of crimes that will result in great bodily injury with the intent to place the victim in sustained fear for personal safety or the safety of immediate family members adequately advises an individual and law enforcement of the conduct prohibited by the statute. One who willfully threatens violence against another, intending that the victim take the threat seriously and be fearful, cannot reasonably claim to be unaware that the conduct was prohibited." (*Maciel*, *supra*, 113 Cal.App.4th at p. 685.) The court further found that the phrases contained in the challenged language, even taken out of context, are not unconstitutionally vague. (*Id*. at pp. 685-686.)

Appellant relies on *State v. Hamilton* (Neb. 1983) 340 N.W.2d 397, where the Nebraska Supreme Court found a criminal threats statute containing language similar to that challenged by appellant to be unconstitutionally vague. The *Maciel* court

distinguished *State v. Hamilton*, *supra*, because "the challenged Nebraska statute did not include language that the victim must take the threat seriously or any intent element." (*Maciel*, *supra*, 113 Cal.App.4th at p. 686, fn. 3.) We agree with the determination of the *Maciel* court and conclude that section 422 is not unconstitutionally vague.

V. The prosecution of appellant's statement as a criminal threat did not violate his right to free speech.

Appellant contends that his statement about killing all Asians was "vague and generic" and constituted hyperbole, not a true threat, and therefore was protected speech under the First Amendment to the United States Constitution and article I, section 2 of the California Constitution. He claims that the prosecution of his statement as a criminal threat thus violated his right to freedom of speech. This contention lacks merit.

In *People v. Toledo*, *supra*, 26 Cal.4th at page 233, our Supreme Court held that the type of threat satisfying the provisions of section 422 falls outside the protections of the First Amendment. The court cited *In re M.S.* (1995) 10 Cal.4th 698, where it had ruled on a similar challenge to section 422.6, the statute proscribing interference with the exercise of civil rights. In *In re M.S.*, the court stated, "[T]he state may penalize threats, even those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection. [Citations.] In this context, the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, '"communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs . . . ."' [Citations.] As speech strays further from the values of persuasion, dialogue and free exchange of ideas, and moves toward willful threats to perform illegal acts, the state has greater latitude to regulate expression. [Citation.] Nonetheless, statutes criminalizing threats must be narrowly directed against only those threats that truly pose a danger to society. [Citation.] [¶] A threat is an

‘“expression of an intent to inflict evil, injury, or damage on another.”’ [Citation.] When a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside First Amendment protection. [Citations.]” (*In re M.S.*, *supra*, at p. 710.)

Appellant’s statement was clearly a “willful threat[] to perform [an] illegal act[]” and an ‘“‘“expression of an intent to inflict evil, injury, or damage on another.”’”’ (*In re M.S.*, *supra*, 10 Cal.4th at p. 710.) Appellant, who waved a gun as he made the threat, moments after shooting another individual nearby, reasonably should have foreseen that the context and import of his words would cause his victims to believe they would be subjected to physical violence, and his threat therefore was not protected speech.

VI. The evidence was sufficient to support the finding of firearm use on the criminal threat counts.

Appellant contends that the evidence was insufficient to support the findings pursuant to section 12022.5, subdivision (a)(1) that he personally used a firearm in the commission of the criminal threat offenses. This contention is without merit.

Our Supreme Court has held that to “use” a gun within the meaning of section 12022.5, subdivision (a) means ‘“‘“to carry out a purpose or action by means of,” to “make instrumental to an end or process,” and “to apply to advantage.”’ [Citation.]” (*People v. King* (1993) 5 Cal.4th 59, 71.) “‘[I]f the defendant is found on substantial evidence to have displayed a firearm in order to facilitate the commission of an underlying crime, a use of the gun has occurred both as a matter of plain English and of carrying out the intent of section 12022.5(a). Thus when a defendant deliberately shows a gun, or otherwise makes its presence known, and there is no evidence to suggest any purpose other than intimidating the victim (or others) so as to successfully complete the underlying offense, the jury is entitled to find a facilitative use rather than an incidental or inadvertent exposure.” (*People v. Lucas* (1997) 55 Cal.App.4th 721, 745.) A finding of firearm use under section 12022.5, subdivision (a) may be

upheld even where the defendant does not "'actually point the gun, or . . . issue explicit threats of harm.'" (*Ibid*.)

Appellant clearly used a gun in the commission of the criminal threat offenses. When he waved the gun around as he uttered the threat, "Fuck Nips. We gonna kill all Nips," he thus demonstrated to the victims that he in fact had a gun with which he could "kill all Nips." Both the words uttered and the surrounding circumstances determine whether a threat violates section 422. (*People v. Martinez*, *supra*, 53 Cal.App.4th at pp. 1218, 1220.) The waving of the gun, together with the fact that Savy and Chhin had just heard gunshots, constituted the circumstances that made appellant's threat to commit a crime resulting in death so unequivocal, unconditional, immediate and specific as to convey to the victims his gravity of purpose and the immediate prospect of execution of the threat, and caused the victims to be in reasonable and sustained fear. The waving of the gun thus facilitated the commission of the offenses. As to Chhin, although she did not testify regarding the gun, the evidence that she told her daughter that she ducked because she thought appellant was going to shoot her sufficiently establishes that appellant used the gun in the commission of the offense.

[End of Part Not Certified for Publication]

VII. The evidence was insufficient to establish the criminal street gang allegation.

Appellant contends that the evidence failed to support the jury's finding that the attempted murder was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1). He argues that there was insufficient evidence of two of the elements of the enhancement allegation, that the gang's primary activities were the commission of enumerated crimes and that the predicate offenses established a pattern of criminal gang activity. We agree that the evidence failed to establish that the gang's primary activities were the commission of enumerated crimes.

Under section 186.22, subdivision (f), the prosecution must establish that the gang has "as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e) . . . ."

The acts enumerated in subdivision (e) include, in part, unlawful homicide or manslaughter, felonious assault, possession of a concealable firearm, sale of narcotics, threats to commit crimes resulting in death or great bodily injury as defined in section 422, and the intimidation of witnesses and victims as defined in section 136.1.

"To trigger the gang statute's sentence-enhancement provision (§ 186.22, subd. (b)), the trier of fact must find that one of the alleged criminal street gang's primary activities is the commission of one or more of certain crimes listed in the gang statute. . . . [¶] . . . [¶] Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322, 323.) "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*Id*. at p. 323.) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v.*] *Gardeley* [(1996)] 14 Cal.4th 605[, 620]. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. [Citation.]" (*Sengpadychith*, *supra*, at p. 324.)

Respondent urges that Detective Morales's testimony regarding CLB's history of racial hatred and violent acts toward Asians, including the beating of an Asian child some years earlier and the shootings of Asian men in February 2002, as well as the instant offenses, suffices to establish this element.[5] This claim lacks merit.

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[5] In the prosecutor's closing argument, he attempted to rebut defense counsel's claim that shooting people was not established to be the primary activity of the CLB

No expert testimony such as that provided in *People v. Gardeley*, *supra*, 14 Cal.4th at page 620, was elicited here. Even if we assume that the CLB gang was responsible for the shootings of Asians on February 16 and 18, as well as the shooting of Siuva C., such evidence of the retaliatory shootings of a few individuals over a period of less than a week, together with a beating six years earlier, was insufficient to establish that "the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 324.) In the absence of proof of this element of the criminal street gang allegation, the finding on the allegation must be stricken.

[This Part Is Not Certified for Publication]

In view of this conclusion, we do not reach the issue of the sufficiency of the evidence to support the second challenged element, the pattern of criminal street gang activity. Nor need we address appellant's instructional contentions with respect to the criminal street gang allegation, including the trial court's failure to identify and instruct on the predicate offenses required to establish the pattern of criminal activity or its failure to instruct on how to evaluate hypothetical questions pursuant to CALJIC No. 2.82; and we need not reach appellant's claim of error as to the criminal street gang sentence enhancement.

VIII. Appellant has not established that he was denied the effective assistance of counsel.

Appellant contends that his trial counsel provided ineffective assistance by failing to object to the admission of testimony that ammunition and weapons unrelated to the shootings were recovered from his residence and the garage of his residence. He asserts that the evidence was irrelevant and unduly prejudicial, and that since an objection would have resulted in the exclusion of the evidence, counsel's failure to

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gang. The prosecutor stated, "I submit to you what else were they doing for that one week in time after their friend had been killed? They shot numerous people. That's a primary activity."

object constituted ineffective assistance, requiring reversal. This claim is without merit.

"To prevail on a claim of ineffective assistance, a defendant must show both that counsel's performance was deficient -- it fell below an objective standard of reasonableness -- and that defendant was thereby prejudiced. [Citation.] Such prejudice exists only if the record shows that but for counsel's defective performance there is a reasonable probability the result of the proceeding would have been different. [Citation.]" (*People v. Cash* (2002) 28 Cal.4th 703, 734.) There is a strong presumption that counsel's performance fell within the range of reasonable professional assistance. (*People v. Mendoza* (2000) 24 Cal.4th 130, 158.)

Here, an objection would have been futile. The trial court has broad discretion in ruling on the relevance of evidence (*People v. Cash*, *supra*, 28 Cal.4th at p. 727) as well as on whether evidence is more prejudicial than probative under Evidence Code section 352 (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121). The trial court here would have been within the sound exercise of its discretion in overruling a defense objection to admission of the evidence of ammunition and firearms.

The attempted murder was accomplished by means of a shooting, and the criminal threat offenses were committed with use of a gun. No firearm was recovered. Expert testimony established that gang members pass guns from one to another and do not keep firearms used in shootings in their own homes. Expert testimony also established that the presence in appellant's home of ammunition of various types indicated that he had access to different types of weapons. Based on this testimony, the evidence of the ammunition found in appellant's home was relevant to establish appellant's guilt of the charged offenses as well as to prove the criminal street gang allegation. The evidence was not unduly prejudicial; appellant was an admitted gang member, and expert testimony established that gang members possessed and used guns. Evidence is prejudicial within the meaning of Evidence Code section 352 only where it "'"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues. [Citations.]" (*People v. Kipp*, *supra*, 26

Cal.4th at p. 1121.) Since an objection to this evidence would have been futile, we cannot conclude that trial counsel rendered ineffective assistance in failing to make an objection. (*People v. Lewis* (1990) 50 Cal.3d 262, 289.)

IX. The admission of hearsay does not require reversal.

Appellant contends that the trial court erred in admitting a police officer's hearsay testimony that an unidentified Asian shooting victim said he was shot by the CLB gang. Appellant asserts that the statement was not admissible under the spontaneous declaration exception to the rule against hearsay (Evid. Code, § 1240) and that its admission denied him his Sixth Amendment right to confront witnesses.[6] The confrontation claim has been waived, since it was not raised in the trial court. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186.) In any event, we need not address either issue here because even if admission of the statement was erroneous or an abuse of discretion, such error would be harmless even under the *Chapman* standard. (*People v. Lara*, *supra*, 30 Cal.App.4th at p. 676.)

The hearsay statement was utilized by the prosecutor as evidence supporting the criminal street gang allegation. We have held that the criminal street gang allegation must be stricken because the evidence failed to establish the primary activity element (see part V, *ante*). Appellant argues that the erroneous introduction of the hearsay statement linking the CLB gang to the shootings of the Asian youths prejudiced the jury against him as to the charged crimes, given the testimony that he was a CLB gang member. This claim is not persuasive.

Appellant was identified from a photographic lineup five days after the offenses by Siuva C., Savy S., and Zinaida Cabiera, and he was identified in court by Siuva,

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6 During oral argument, the parties offered to submit supplemental briefing on the impact of the Supreme Court's recent opinion in *Crawford v. Washington* (Mar. 8, 2004, No. 02-9410) ___U.S. ___[2004 WL 413301] on the confrontation issue. As will be seen, we need not address the potential applicability of *Crawford*.

Savy, Cabiera, and Melinda L.[7] Appellant claims that "serious questions" were raised as to the accuracy of the eyewitnesses' identifications of him, including Siuva's testimony that he noticed a mole on the eyebrow of his assailant, which was not apparent on appellant's face. Nevertheless, each of the witnesses who identified him from a photographic lineup chose his picture from among a set of 12 photographs, and although each expressed less than 100 percent certainty, none indicated any apprehension that he might have chosen the wrong individual. Siuva, Melinda and Savy had ample opportunity to observe appellant in broad daylight at the time of the crimes. Melinda had been asked by police if she could identify as the shooter any of the three youths who were detained shortly after the shooting of Siuva, and she did not identify any of them. Appellant was not one of the three. Appellant's alibi witnesses did not establish an alibi for the time of the offenses. In addition, appellant's sister testified that appellant often rode a bicycle resembling the one described by the witnesses. Most significantly, the hearsay statement implicating CLB in the shooting on February 18 was no more prejudicial than the evidence that the shootings on February 16 and February 18, as well as the shooting of Siuva on February 21, were all committed with the same gun. There is no reasonable possibility of a different outcome had the hearsay statement regarding CLB not been introduced.

X. The trial court's statement of reasons for consecutive sentencing was proper.

Appellant contends that the trial court failed to state valid reasons when it ordered the sentences for the criminal threat counts, counts 2 and 3, to run consecutively with each other. He argues that none of the reasons for consecutive sentencing set forth in California Rules of Court, rule 4.425[8] applies in this case and

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[7] Although Melinda testified that she did not recall viewing a photographic lineup, the detective who conducted the procedures testified that she had in fact participated in a photographic lineup. He did not testify as to whether or not Melinda made an identification from the lineup.

[8] California Rules of Court, rule 4.425 (a) provides that the decision to impose consecutive sentences may include "[f]acts relating to the crimes, including whether or

that the trial court erroneously attempted to justify its choice of consecutive sentences by reference to multiple victims, a factor set forth in former California Rules of Court, rule 425 (a)(4) that does not apply where there was only one victim in each count. (See, e.g., *People v. Humphrey* (1982) 138 Cal.App.3d 881, 882-883.)

Even were we to find that defense counsel had no meaningful opportunity to object when the trial court pronounced judgment (*People v. Gonzalez* (2003) 31 Cal.4th 745, 752, 755), and therefore that this claim is preserved for appellate review despite the absence of an objection below (*People v. Scott* (1994) 9 Cal.4th 331, 352-353), appellant's claim lacks merit.

In imposing judgment, the trial court selected the upper term on count 1, attempted murder, then stated, "With respect to count two, in this court's opinion he has committed separate crimes against separate individuals affecting the enjoyment of life of other individuals and therefore deserves additional and consecutive punishment. [¶] He is to serve an additional eight months which is one third of the mid term for the [section] 422 in count two. And for the separate gun use he is to serve an additional and consecutive one year four months . . . . [¶] With respect to count three, [he] is to serve an additional and consecutive eight months . . . . And an additional and consecutive one year four months . . . [on] the gun use allegation."

When read in context, it is clear that the challenged statement was the trial court's reason for imposing a consecutive sentence on *each* of the criminal threats counts, that in each case appellant had committed an offense against a different victim affecting that victim's enjoyment of life. The trial court's justification for consecutive

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not: [¶] (1) The crimes and their objectives were predominantly independent of each other. [¶] (2) The crimes involved separate acts of violence or threats of violence. [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." In addition, California Rules of Court, rule 4.425 (b) provides that, with specified limitations, "[a]ny circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences . . . ."

sentencing comes within California Rules of Court, rule 4.425 (a)(2), that the crimes involved separate acts of violence or threats of violence. Threats of violence against separate victims may be punished with consecutive sentences even where they occur on the same occasion. (*People v. Calderon* (1993) 20 Cal.App.4th 82, 86-87.) The trial court stated adequate reasons for the choice of consecutive sentencing in counts 2 and 3.

[End of Part Not Certified for Publication]

DISPOSITION

The true finding on the criminal street gang allegation is reversed and the life term imposed for that allegation on count 1, attempted murder, is stricken. The judgment is reversed as to count 3, criminal threat, with directions as follows: If the People do not bring appellant to trial on that count within 60 days after the filing of the remittitur in the trial court pursuant to Penal Code section 1382, subdivision (a)(2), the judgment shall be deemed modified to reflect a conviction of attempted criminal threat in count 3 and a consecutive sentence of four months on that count. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

_____, J.

DOI TODD

We concur:

_____, P.J.
BOREN

_____, J.
NOTT